CORPORATION COURT OF DANVILLE.

CARDWELL, RECEIVER, ETC. v. TALBOTT.

1. ORDER OF PUBLICATION—*Personal judgment—Code, section 3230.*—Under section 3230 of the Virginia Code, authorizing an order of publication where, in a suit in equity, the number of defendants exceeds thirty, a personal decree may be entered against a defendant so summoned, if he be a resident of this State, though he make no appearance.
2. ORDER OF PUBLICATION—*Decree—Res judicata.*—A personal and final decree rendered against a resident defendant, who is summoned by publication under section 3230 of the Virginia Code, and who makes no appearance, is *res judicata;* and no defense which might have been made in the original suit can be pleaded in defense of a motion at law, brought for a judgment on the decree.
3. DECREES.—*Actions or motions on, for judgment.*—Although judgments and decrees for money may be enforced by execution, the plaintiff may have an action for judgment thereon, under section 3577 of the Code—or a motion for judgment, under section 3211. There is no distinction in this respect between judgments and decrees.

Motion before the Corporation Court of Danville, for judgment on a decree of the Chancery Court of the city of Richmond. The opinion states the case.

Peatross & Harris and *W. D. Cardwell,* for the plaintiff.

Withers & Green, for the defendant.

A. M. AIKEN, Judge:

The defendant in this motion is a subscriber to the stock of the Virginia Steel, Iron & Slate Company, a joint stock company organized under the laws of Virginia.

The bill filed by Flournoy, etc., against the company in the Chancery Court of Richmond shows that the company was in debt by judgment and otherwise, and that the creditors were seeking to enforce their demands, for the payment of which there were no assets except the unpaid subscriptions of the stockholders.

The bill prayed that the stockholders, including the defendant Talbott, might be made defendants; that an account of the assets might be taken, and that the several stockholders might be compelled to pay up their delinquent subscriptions, to the end that the debts of the company might be satisfied.

On the day of the filing of the bill (the 12th of July, 1892) a receiver was appointed. On the 24th of October, 1892, it appearing to the court, or judge in vacation, that the number of parties to the bill upon whom process had been served exceeded thirty, and that there were still other parties to the bill who had not been served with process, it was ordered that notice to these other parties be given by publication.

It was stated in the order of publication, among other things, that one of the objects of the suit was to ascertain the amounts due by the several stockholders, respectively, to the company, and the defendants upon whom process had not been served were required to appear and defend the suit, and do what was necessary to protect their interest.

The defendant Talbott was one of those defendants included in this order of publication. In due time after publication of the order, on the 22d of October, 1892, an order was entered in the cause directing a commissioner to take an account and report the names and residences of the stockholders, and of the number of shares held and the amounts due by each of them. The report of the commissioner, made under this last order, was filed on the 28th of February, 1896, and the information it gave, so far as it is pertinent to this case, was that the defendant Talbott was the owner of two shares of stock in the company, and the amount due by him was $80.

This report was confirmed by the Chancery Court of Richmond, by a decree entered in the cause on 1st day of May, 1896, and it was ordered that all of the defendant stockholders of the company pay the amounts found due by them by the report, to the receiver, within thirty days from the date of the decree.

On July 10, 1896, the receiver was authorized to institute suits at law to recover the amounts decreed against the parties by the decree of May 1, 1896, and by virtue of the authority given by that decree the receiver commenced this motion on the 9th day of November, 1898.

The defendant has filed three pleas to the motion—infancy, *res judicata*, and the statute of limitations. In the argument, too, he relied on a ground of defence not comprehended by either one of the pleas, but more properly pleadable as matter for a rehearing or review of the decree entered in the chancery suit of *Flournoy &c.* v. *Va. Steel, Iron & Slate Co.*, on the 1st of May, 1896.

It was argued that there was nothing in the pleadings or exhibits in the said chancery suit to show that the interests of the parties to

that suit who were served with process, and the interests of those who were not, were alike, and, therefore, the defendant and others should not have been proceeded against by order of publication. So far as I could judge from hearing the bill read, the interests of the several stockholders *were* alike, but if they were not it seems to me that the defense upon that point should be made by a petition for a rehearing, or by a bill to review the decree of May, 1896, and cannot be made under either one of the pleas filed to this motion.

The admissibility of the several pleas of the defendant depends upon the character of the decree made in the chancery suit on the 1st May, 1896. If the demand made upon the defendant in the chancery suit was the same demand that is made in this motion, and after due notice and hearing the decree ascertained the amount demanded and due, and ordered it to be paid, then the subject has become *res judicata*, and cannot have another day in court and be relitigated in this motion.

The bill in the chancery suit charged that the defendant and others were indebted to the company for shares of stock to which they had subscribed, and prayed that an account of it might be taken, and the defendants decreed to pay it. The order of publication notified them that the object of the suit was to have an account of the amounts due by them, respectively, and required them to appear and defend the suit and do what was necessary to protect their interest. Upon their failure to appear, the court was required by the statute to try or hear the cause as to them; they not appearing, the court directed the commissioner to make an enquiry and report the names and residences of the stockholders and the amounts due by each, which was done and reported, and the court confirmed the report and decreed that the stockholders should pay the amounts reported due by them within thirty days. This was all regular and in strict conformity with the practice of the chancery court in proceedings to ascertain the liabilities of parties subject to its jurisdiction.

A suit for the debt was instituted, notice of the suit given the defendant, the object of the suit stated in the notice, and the defendant required to appear and defend it. Then the court was authorized by the statute to hear and decide the cause. The notice to the defendant by publication was sufficient under the statute. The case of *Pennoyer* v. *Neff*, 95 U. S. 714, decided that a personal judgment against a non-resident, upon an order of publication, was not valid, upon the ground that one State had no jurisdiction over the persons and property of the citizens of other States outside of its terri-

tory, and therefore could not render a binding personal judgment, unless personal service of process was made within the jurisdiction of the State where the court was sitting.

Personal service upon a non-resident of the State where the suit was, was required to make "due process of law." But that is a very different thing from the right of a State to exercise complete sovereignty and jurisdiction over all persons and property within its own territory, and to prescribe what shall be sufficient notice to bind the persons and property of its own citizens within its own confines.

It seems clear that the decree of May, 1896, in the chancery suit, disposes of the whole subject between the company and the defendant, and there was nothing more to be done except to execute the decree.

A decree is final when it disposes of the whole merits of the case and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for another decision. This definition is the substance of the authorities.

This motion being based on the final decree of May, 1896, the question now arises what matter can be pleaded in bar of the recovery of this motion. In section 255 of Wells on Res Judicata, it is stated that when an action is brought directly on the former judgment, a defendant cannot relitigate it by setting up anything which he could have interposed in the original suit when the judgment was rendered.

I believe this quotation from Wells is the law of the subject. As to the right of a party to sue on a judgment or decree for the payment of money when an excution could, or could not, issue, it will be found in the 432d section of Freeman on Judgments, that at common law a party has a right of action upon his judgment as soon as it is recovered. This right is neither barred nor suspended by the issuing of an execution; nor because, from having the right to take out execution, the plaintiff's action seems to be unnecessaay. An examination of the title "The Execution" in Blackstone's Commentaries will show that the judgment could be sued on till it was paid, and, after a year and a day from the date of the judgment, no other remedy but an action was known to the common law. Section 3577 of the Code of Virginia, is substantially the common law, except the limitations upon the right to issue executions and to sue on the the judgment. That section allows an action on a judgment at any time within ten years *after the date of judgment*, whether an execution has issued or can issue on the judgment or not.

At one time there was a distinction made between judgments and decrees for money, and an action upon a decree was not allowed; but this distinction was abolished by the case of *Pennington* v. *Gibson*, 16 Howard [65], where it was held that in every case where an action of debt can be maintained upon a judgment for money, a like action can be maintained upon a decree of a court of equity.

It will be observed, too, that section 3557 of the Code declares that a decree for the payment of money shall have the effect of a judgment, and be embraced by the words "judgment."

The complaint that a defendant will be vexed by unnecessary suits if a creditor is permitted to bring an action on his judgment when an execution can issue upon it, was made as often at common law as it is now, and it is admitted to be true; but the courts have answered that a defendant can always put a stop to the vexatious suits by paying the judgment and end the litigation.

There was a good deal said in the argument about the act of December 22, 1897, providing where suits for the enforcement of unpaid stock subscriptions should be brought, and what defense should be allowed. I do not think that act opens the way to the defense set up here. It is expressly provided in that act that it shall not apply to any suit heretofore or hereafter brought in which a final decree on its merits has been rendered.

The decisive point in the case is whether the decree of May, 1896, is a final one on the merits. I think it is, and, therefore, the pleas filed are not admissible under the act.

Judgment for plaintiff.

NOTE.—For authorities on the general subject of the validity of a personal judgment or decree against a resident or non-resident defendant who does not appear, see 2 Va. Law Reg. 47; *De La Montanya* v. *De La Montanya*, 112 Cal. 101, and monographic note thereto in 53 Am. St. Rep. 179–191. It is to be regretted that the court in the principal case cites no authority for the proposition that citizens of the State, within its boundaries at the commencement of the suit therein, are bound by a personal judgment entered by default, upon constructive service of process. We agree that the principle is sound where the statute authorizes such service, and is strictly followed, but there seems to be little or no well-considered authority directly in point, subsequent to *Pennoyer* v. *Neff*. See Mr. Freeman's discussion of the subject on page 180 of the monographic note above cited.

Another phase of the question arises where the defendant is a domiciled citizen of the State whose court entered the judgment, but the process was constructively served during his absence from the State. The effect of a personal judgment in such case is exhaustively discussed in *De La Montanya* v. *De La Montanya* (*supra*),

where the majority of the court held the service ineffective for purposes of a personal judgment. Similar cases are cited and reviewed in the same note, pp. 186–189.

There can be no doubt of the right of a judgment creditor to sustain an action on his judgment or decree, notwithstanding his already existing right to issue execution. 1 Black on Judgments, 484; 2 *Id.* 958; and, as shown in the opinion in the principal case, the statute in plainest terms preserves this common law privilege. No question seems to have been made, in the principal case, as to the right to substitute a motion for an action in such case. Where the judgment is on a contract, doubtless a motion under sec. 3211 of the Code is proper; but *quere* whether the motion would lie on a judgment not on a contract. The statute permits a motion only where the plaintiff is "entitled to recover money by action on any *contract.*" A judgment on a cause of action not arising out of contract is not a contract, lacking, as it does, the *aggregatio mentium.* *Garrison* v. *City of New York*, 21 Wall. 196; *Freeland* v. *Williams*, 131 U. S. 405; 1 Black on Judgments, 7–10; *O'Brien* v. *Young*, 95 N. Y. 428 (47 Am. Rep. 64).